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No. 85-1591

In The

Supreme Court of the United States

October Term, 1985

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend of Certain MINOR UNBORN CHILDREN and Certain MINOR RECENTLY BORN CHILDREN, for and in behalf of such MINOR CHILDREN, as a Class, ET AL,

Petitioners,

v.

VASEEM ALI, M.D., ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

PETITIONERS' REPLY BRIEF TO RESPONDENTS' JOINT OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT:

Come now all Petitioners in the above-entitled and numbered cause and submit this, their Reply Brief, to Respondents' Joint Opposition To Petition for a Writ of Certiorari to the Court of Appeals for the First Supreme Judicial District of Texas ("Respondents' Brief"), showing respectfully the following:

REPLY ARGUMENT

I.

THE COURT OF APPEALS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION IN HOLDING THAT PETITIONERS LACKED STANDING TO SUE

In their Petition for a Writ of Certiorari ("Petition"), Petitioners contended that the Court of Appeals violated the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution by denying legal standing to them when Texas law recognizes such standing in *nonabortion* litigation. In other words, the Court discriminated invidiously against Petitioners because of the subject matter of their claims.

Respondents have not answered the contention, nor have they explained, for example, how it could be that taxpayers have standing under Texas law to sue to prevent the unlawful expenditure of taxes for *nonabortion* purposes but lack such standing where the expenditures are for *abortion* or *abortion-related* purposes. Instead, they close their eyes to the discrimination and deprivation, and endeavor to show an absence of legal standing.

A. *Unborn Children.* First, Respondents claim (Respondents' Brief, pp. 5-6) that unborn children are not

"minors" under Rule 44, *T.R.C.P.*, and hence may not sue by next friend, citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App.—Houston, 14th Dist., 1980), err. ref. n.r.e., *cert. denied*, 449 U.S. 1081 (1981), which relied on *Roe* in such respect. But *Roe's* "nonpersonhood" holding for the unborn under the *14th Amendment* does *not* operate to foreclose representation for the unborn under *Rule 44*.

Moreover, the right of unborn children to representation in legal proceedings which affect them is well established under Texas and other law. E.g., *Tex. Family Code*, §§ 11.10(a), 15.021; *Tex. Probate Code*, § 131, as applied in *In re Temporary Guardianship of Michelle Joubert*, etc., No. 163,070, Order dated February 13, 1980 (Prob. Ct. No. 3, Harris Co., Tex.) (appointing a temporary guardian for an unborn child and appointing a temporary guardian for the mother of such child, etc.); *Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ.[1] Even this Court has recognized such right. *Roe v. Wade*, *supra*, 410 U.S. at 162; *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885).

B. *Abortion "Survivors."* Next, Respondents claim (Respondents' Brief, p. 6) that children born alive after abortions have legal guardians, i.e., their parents or the Texas Department of Human Services, and hence are not

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[1] Respondents seem to think that standing to represent unborn children requires that there be a "relationship or link" between the children and their next friends. There is, however, no such requirement under Texas law. Rule 44, *T.R.C.P.* "Any competent adult may sue in that capacity [as next friend] so long as it is in the best interest of the child." *Gordy v. Alexander*, 550 S.W.2d 146, 150 (Tex. Civ. App.—Amarillo, 1977), err. ref. n.r.e.; *Gallegos v. Clegg*, 417 S.W.2d 347, 352 (Tex. Civ. App.—Corpus Christi, 1967), err. ref. n.r.e., 1 McDonald, *Tex. Civil Practice* (1965), § 3.09.2, p. 253.

entitled to next friend representation under Rule 44. They overlook, however, that the absence of legal guardian requirement of Rule 44 means absence of a Texas *court-appointed* guardian. It does not mean the natural guardianship posture of parents. See *Herrin v. Falcon,* 198 S.W. 2d 117, 122 (Tex. Civ. App.—Beaumont, 1946), err. ref. n.r.e.; *Bonner v. Ogilvie,* 58 S.W. 1027, 1028 (Tex. Civ. App., 1900), no writ. Otherwise, parents would not be able to serve as next friends for their children, which would be contrary to long-continued practice in Texas.

In any event, parents who have attempted to have their unborn children killed by abortion could hardly be classified as legal guardians of their abortion "survivor" children under Rule 44. Indeed, their parent/child relationships may be severed for such conduct, with exceptions not here pertinent. *Tex. Family Code,* § 15.022.

Respondents' assertion (Respondents' Brief, p. 6 and fn. 2, p. 6) that the Texas Department of Health and Human Services would be the "lawful guardian" of any child born alive after an abortion is a misstatement of *Tex. Family Code,* § 17.011. That section provides that an authorized representative of the Department "may assume" the care, control and custody of a child who survives an abortion and, "if so," such representative would be required to file an appropriate petition in court. The Department is not an automatic guardian, as Respondents seem to think.[2]

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[2] Respondents also argue (*Id.,* pp. 6-7) that the "proposed class" of recently born children would not be entitled to the appointment of Petitioners as guardians ad litem under Rule 173, *T.R.C.P.,* because Petitioners (as next friends) have not established an adverse interest with regard to any abortion survivor. What Respondents overlook, however, is that Rule 173,

(Continued on following page)

C. *Citizens, Residents and Taxpayers.* Respondents claim (Respondents' Brief, p. 7) that the individual and class postures of the Berkley and Gomez Intervention do not present a federal question because citizen, resident and taxpayer standing is governed completely by Texas law. But the due process and equal protection claims of Petitioners under the 14th Amendment to the U.S. Constitution raises a clear-cut federal question.

Respondents' contention (*Id.*, p. 8) that taxpayer standing for Berkley and Gomez "would require a showing that there is an agreement in violation of the Texas Constitution or is otherwise illegal" is absurd. If the opposite were true, Intervenors would be required to establish the critical aspect of their case as part of defending their suit posture. Standing and the merits are different subjects altogether.

Finally, Respondents argue (*Id.*, p. 7) that Berkley and Gomez lack standing because they do not have a personal and particularized injury. Not only is there no such requirement for taxpayers such as these [*Kordus v. City of Garland*, 561 S.W. 2d 260, 262-263 (Tex. Civ. App.—Tyler, 1978), err. ref. n.r.e.; see *South Texas Publishing Co. v. Jahn*, 7 S.W. 2d 941, 945-946 (Tex. Civ. App.—Austin, 1928), err. ref.], but they in fact *did plead* personal and particularized injuries, i.e., that the abortion "ethic" posed

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which Petitioners did *not* invoke, is *not* the exclusive base on which to appoint a guardian ad litem. "Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians ad litem." E.g., 27 *Am. Jur.* "Infants," § 120, pp. 840-841. A court may appoint a guardian ad litem where children, including unborn children, are before the court without a representative. *Mitchell v. Mitchell*, 235 S.W.2d 744, 750 (on rehearing) (Tex. Civ. App.—Galveston, 1950), *reversed on other grounds*, 244 S.W.2d 803 (S.C. Tex., 1951).

a threat to them and their families, that they were being forced to pay taxes to promote the abortional killing of children and that they were being defrauded and deprived of their rights to have the Defendants in Intervention obey the U.S. and Texas Constitution and laws, etc. (Tr. 376-377).

D. *The Classes of Infant Victims of Abortion.* Finally, Respondents appear to believe that the classes of infant victims of abortion are not before this Court (Respondents' Brief, pp. 5, 6). While the Trial Court refused to certify any of the classes in this case under Rule 42, *T.R.C.P.*, group posture for the Harris County-wide class of Children represented by Schwanecke and the State-wide class of Children represented by Berkley and Gomez was pleaded under the permissive joinder provisions of Rule 40, *T.R.C.P.* (as well as otherwise) (Tr. 336, para. no. 8; Tr. 377-378, para. no. 14), and the Trial Court did *not* deny any such joinder. These Children—affected Unborn and Abortion "Survivors"—are before this Court through their next friends.

II.

THE USE OF STATE RESOURCES FOR ABORTIONS OR ABORTION-RELATED ACTIVITY IS UNCONSTITUTIONAL

Respondents argue (Respondents' Brief, pp. 8-10) that even if Petitioners' allegations concerning the use of state resources for abortions or abortion-related activity were true there would be no legal wrong since a state may aid abortions if it so chooses. What they miss; however, is that this Court has ruled that *Roe* is *not* to be applied to fact situations which were not before the Court [*Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975)], and that this Court has never upheld the constitutionality of direct state involve-

ment in abortion. *Roe* authorized abortion in a private patient/physician context. It did not authorize state abortion or abortion-promotive conduct.

While the question of public funding of abortions is not novel to this Court, this case, insofar as Texas is concerned, covers substantially *more* than public funding concerning abortions. It involves (1) *direct* state involvement in the abortional killing of the state's own posterity and (2) a *waging of war* on its own law relative to the rights posture of unborn children: Respondent University of Texas (a state institution) is affiliated with Respondent Hermann Hospital Foundation d/b/a Hermann Hospital (a private institution), with the University providing physicians and the Hospital providing physical facilities and personnel, etc. for the University's Medical School (Tr. 299, 550-563); abortions not required to save maternal life based on appropriate medical judgment are performed at the Hospital (Tr. 548-549); Respondent Ali is a medical teacher or instructor at said Medical School (Tr. 291-292); Respondent Attorney General Mattox is defending Ali and expending tax monies in so doing (Tr. 295-296); and substantial tax monies of Texas are appropriated to the University and its said Medical School (See footnote 2 of the Petition, p. 4.). It is alleged that Ali teaches abortion methods or techniques to medical students at said Medical School. For the reasons and authorities in the Petition, pp. 10-11, the state action here at issue is unconstitutional, pure and simple.

Finally, Respondents' assertion (Respondents' Brief, p. 10) that "Petitioners' remedy lies in the state legislature and not in the courts" fails to come to grip with the constitutional issue here presented. The State of Texas does not have the constitutional authority to engage di-

rectly in the abortional killing of unborn children. See the Petition, pp. 9-11.

III.

THIS COURT SHOULD RECONSIDER AND OVERRULE ROE V. WADE AND DOE V. BOLTON

Petitioners advanced a number of reasons why this Court should reconsider and overrule *Roe v. Wade, supra,* 410 U.S. 113, and *Doe v. Bolton,* 410 U.S. 179 (1973). Respondents address briefly certain of these areas, broad-brush the constitutional and person jurisdictional challenges and conclude that *Roe* and *Doe* "are sound and do not warrant reconsideration" (Respondents' Brief, pp. 10-12). These arguments are without merit.

The claim that Petitioners' arguments as to the unconstitutionality of *Roe* and to the lack of personal jurisdiction over the victims of abortion "make sense only if the Court were to depart from its key holding that the word 'person,' as used in the fourteenth amendment, does not include the unborn" (*Id.,* p. 12) overlooks three salient matters: (1) the infant victims of abortion also include Abortion "Survivors," who happen to be U.S. Citizens (with minor exceptions not here pertinent), and they most assuredly have rights postures under the 5th, 9th and 14th Amendments to the U.S. Constitution; (2) various of the Constitutional challenges presented have nothing to do with 14th Amendment personhood for the unborn, e.g., this Court's manufacture of the constitutional right to abortion, the naked deprivation of property and other rights in the unborn; and (3) the rank unfairness of using the Court's 14th Amendment nonpersonhood holding against the unborn in this case when unborn children were not represented before this Court when such holding was made.

While *stare decisis* has its place in law, "vested error", particularly constitutional error, does not. This Court should be sensitive to claims that it erred constitutionally, particularly in cases like *Roe* and *Doe* where the constitutional and jurisdictional error are clear-cut and far reaching.

As for abortion survivors, Petitioners do not claim that such children are outside the protection of Texas law. The claim is that these Children are impacted directly by *Roe* and *Doe,* yet were not before or even considered by the Court in such cases. An abortion survivor, for the most part, is born alive in the most monstrously hostile atmosphere imaginable for a defenseless child—where those in attendance are the abortionist whose job is to bring forth a dead child, the "mother" who desires or expects such a result, and attendants, etc. who work for or are allied with the abortionist or the "mother."

The Abortion "Survivor" who was murdered at Jefferson Davis Hospital in Houston (Tr. 545-547) was a member of the Harris County Children Class represented by Dr. Schwanecke (and the averred State-wide Children Class represented by Berkeley and Gomez), and the Hospital was included in the averred Defendant Class. Accordingly, the fact that Jefferson Davis Hospital was not named as a defendant (Respondents' Brief, p. 11) is of no particular moment.

As for the unintended consequences of abortion on demand, *Roe* quite clearly indicates that abortion on demand was not intended. The female's abortion decision, in consultation with the "attending physician," is mocked by assembly-line abortions, etc.

Finally, *Roe*'s holdings were made in the context where the core consideration—when life begins (and whether the unborn child is alive)—was left unresolved. This case presents an answer to that matter, namely, that human life begins at conception (Tr. 119).

IV.

THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD IN UPHOLDING THE AWARD OF ATTONEYS FEES

The Opinion of the Court of Appeals shows quite clearly that the Court, in upholding the Trial Court's award of attorneys fees and expenses under 42 U.S.C. 1988, applied abuse of discretion and unjustness standards (Pet. App. 6). That, however, is *not* the standard articulated by the U.S. Court of Appeals for the Fifth Circuit for the award of attorneys fees under 42 U.S.C. 1988 to a *defendant* who prevails in a case under 42 U.S.C. 1981-1986. Contrary to Respondents' argument (Respondents' Brief, p. 13), the award to certain prevailing defendants could be upheld *only* upon a finding by the Court of Appeals that the lawsuit against such defendants was "without foundation, unreasonable, frivolous, meritless or vexatious" [*Crawford v. Western Electric Co.*, 614 F.2d 1300, 1321 (C.A. 5, 1980)]; or that the claims were "frivolous, unreasonable or groundless; or * * * the plaintiff continued to litigate after it clearly became so" [*Lopez v. Aransas County I.S.D.*, 570 F.2d 541, 545 (C.A. 5, 1978), quoting from *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)]. Since the Court of Appeals made no such determination, the award of attorneys fees and expenses simply could not be upheld lawfully under 5th Circuit decisions which the Court of Appeals was required to follow in applying 42 U.S.C. 1988.

CONCLUSION

For the reasons and authorities set forth herein and in the Petition, it is submitted respectfully that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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